UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRIME HEALTHCARE SERVICES – ENCINO HOSPITAL, LLC d/b/a ENCINO HOSPITAL MEDICAL CENTER

and **Case No. 31-CA-131701**
31-CA-140827

SEIU UNITED HEALTHCARE WORKERS – WEST

PRIME HEALTHCARE SERVICES – GARDEN GROVE, LLC d/b/a GARDEN GROVE HOSPITAL AND MEDICAL CENTER

and **Case No. 21-CA-131714**
31-CA-140844

SEIU UNITED HEALTHCARE WORKERS – WEST

PRIME HEALTHCARE CENTINELA, LLC d/b/a CENTINELA HOSPITAL MEDICAL CENTER

and **Case No. 31-CA-131703**
31-CA-141016

SEIU UNITED HEALTHCARE WORKERS – WEST

CONSOLIDATED REPLY BRIEF IN SUPPORT OF RESPONDENTS' EXCEPTIONS AND ANSWERING BRIEF TO THE OFFICE OF THE GENERAL COUNSEL'S AND THE CHARGING PARTY'S CROSS-EXCEPTIONS

The Charging Party, SEIU- United Healthcare Workers – West ("UHW") has alleged that Respondents Prime Healthcare Services - Encino, LLC d/b/a Encino Hospital Medical Center

("Encino"); Prime Healthcare Services - Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center ("Garden Grove") and Prime Healthcare Centinela, LLC d/b/a Centinela Hospital Medical Center ("Centinela"; together with Encino and Garden Grove, the "Hospitals") failed to execute an agreement for a CBA covering the three Hospitals. The hysterical tone of the Charging Party's answering brief, which leads with an *ad hominem* attack, is a not so subtle recognition of the failure of its charge.

This matter is straightforward. The issue is whether the parties had reached agreement. The Charging Party to this very day takes a position contrary to the ruling of the ALJ and the argument of the Counsel for the General Counsel ("General Counsel"). That is no small matter because contract formation requires a meeting of the minds. The fact that the General Counsel believes an agreement was reached that was different from the one alleged by the charging – contracting – party, means that as a matter of law the certainty on material issues required for a meeting of the minds cannot exist.

Beyond the obvious complete failure to even understand what alleged agreement exists is the Charging Party's admission, introduced by the Hospitals, that no agreement existed. The Charging Party's own designated bargaining agent, Richard Ruppert, admitted in writing that the parties had not agreed on the California Differential, a critical and material term of this agreement. ALJ Lisa D. Thompson correctly found that the parties had not reached agreement on this material term. That is the end of the contract formation analysis and, as discussed in the Hospitals' opening brief, the ALJ's attempt to create some deal not reached by the parties was clear error.

The General Counsel and Charging Party seek to obfuscate these clear issues because they have no legitimate arguments to the contrary. Both briefs seek to bury the dispositive and

unassailable facts with a mixture of blatant mischaracterizations of the record and statements unsupported by the record. A detailed discussion of the points raised by the General Counsel and Charging Party is not necessary as they raise little of substance, and nothing to contradict the Charging Party's lead negotiator's own statement that there was no agreement. The Hospitals submit this reply primarily to clarify some of the more egregious misstatements.

A. Neither the Charging Party Nor the General Counsel Can Support the Existence of an Agreement on the California Differential with Record Evidence

Both the Charging Party and the General Counsel except to the ALJ's finding that the parties had not agreed upon the California Differential term.[1] The argument simply is bizarre – the admitted chief negotiator of the union, Mr. Ruppert, said otherwise in writing at the time of the alleged agreement.

But even while ignoring Mr. Ruppert's dispositive statement, the Charging Party and the General Counsel cannot even agree amongst themselves what alleged agreement was reached on the California Differential. The Charging Party argues forcefully that the parties had agreed to eliminate the differential. Brief in Support of Charging Party's Cross-Exceptions to the Decision of the Administrative Law Judge ("UHW Brief") at 1-4. The General Counsel's brief demonstrates particular confusion on the subject, arguing both that the parties had agreed to UHW's last proposal and to the Hospitals' last proposal, which are two different proposals. General Counsel's Cross-Exceptions to the Diction of the Administrative Law Judge, Brief in Support of Cross Exceptions, and Answering Brief to Respondent's Exceptions ("General Counsel's Brief") at 10, 11. If the Charging Party and the General Counsel cannot even have a meeting of the minds on what they are prosecuting with respect to the alleged agreement on the

[1] Notably, neither the General Counsel nor the Charging Party except to the ALJ's express finding that the California Differential was a material term of any agreement between the Hospitals and UHW. Decision and Order at 13:18-25.

California Differential, it is quite literally impossible for General Counsel to have met its burden to establish the terms of the agreement.

Confronted with the inescapable conclusion that no agreement exists, the Charging Party and General Counsel raise new arguments that can only be deemed further admissions that the parties never reached an agreement. The Charging Party contends that there was a "Partial Agreement" with the Hospitals. UHW Brief at 1. The General Counsel similarly hedges, asserting that the parties had "***ostensibly*** reached a tentative agreement." General Counsel's Brief at 13 (emphasis added). In contract law, a "partial" or "ostensible" agreement has a more precise term – no agreement. Under Board law there is only an obligation to execute a full and complete agreement, not a "partial" one or an "ostensible" one. *Park Maint., Palisades Maint. & Park View Towers,* 348 N.L.R.B. 1373, 1381 (2006); *The Intrepid Museum Found., Inc*., Case 2-CA-24988, 1991 WL 331649, at *2 (Nov. 29, 1991).

What remains of the arguments of the General Counsel and Charging Party are distortions and mischaracterizations of the record to make their completely insubstantial arguments appear meaningful. For example, UHW makes the demonstrably false claim that "Mr. Pullman had accepted Prime's proposal to eliminate the California Differential," and even claims this point is "undisputed." UHW Brief at 4. In fact, the portion of the record cited by UHW to make this point says no such thing. The cited testimony simply reflects the undisputed point that the final term sheet contained a reference to the California Differential.

> Q: Now there's a reference there then, at the very – the second to the last bullet, it says, "the California differential solution agreed upon at Centinela will be included." Do you see where it says that?
> A: Yes.
> Q: You considered that to be important.
> A: I don't know if I considered it to be important, but it was part of the agreement.

(Hearing Transcript ("Tr.") 108:24-109:7.). As one of the key issues in this proceeding was the meaning of this ambiguous reference to a material term, testimony as to the fact that the reference existed is neither surprising nor meaningful.

The meaningful part of Mr. Pullman's testimony, which UHW ignores, completely refutes UHW's argument. Just one page later is Mr. Pullman's testimony that he did not know what the specifics of any purported deal were, including when any such agreement was reached, only that such a deal would have been reached by Ms. Schottmiller and Mr. Ruppert. (Tr. 109:25 – 110:14.) And, as Mr. Ruppert stated in writing, they never reached an agreement.

The Charging Party also misstates the record by arguing that the parties did not have to agree to the details of the California Differential. The Charging Party simply asserts, completely unsupported by citation to the record, that implementation was "simply a matter of wage calculation, taking into consideration the wage increases that were also agreed upon by the parties." UHW Brief at 4. Although unclear, it appears that the charging party is claiming that what was left was not material.

Beyond this unsupported and self-serving conclusion, the Charging Party offers nothing. That is because the record evidence very clearly is to the contrary. The evidence reveals that the parties viewed the details as a necessary part of any agreement. The clarity with which this point is made is evidenced by the Hospitals' written statement during negotiations that:

> This needs to be completed now. I don't want to go back to the table on this issue. I thought we were almost at 100% agreement on this.

(JX-2, at 7). Ms. Schottmiller testified without contradiction that the parties absolutely intended to reach a final resolution on the details of how any California Differential agreement would work. (Tr. 313:4-9, 320:6-13.) Even Mr. Pullman, while he was unaware of the details of the

California Differential, understood that the Hospitals needed complete resolution on the issue. (Tr. 121:10-13.)

The General Counsel's brief takes similar liberties with the record. For example, Mr. Ruppert's November 11th e-mail explicitly states that the parties had not agreed on the California Differential term. (RX-59(a) ("We were very close but did not agree yet.") The General Counsel simply ignores this statement. He selectively edits the e-mail to extract the words that the Hospitals "accepted [UHW's] proposal but added the following heading," to argue that the parties had "essentially reached agreement on the California Differential issue." General Counsel's Brief at 11.

The General Counsel conveniently omits from this discussion other critical facts in Mr. Ruppert's e-mail that directly contradict this selective reading. Mr. Ruppert goes on to complain that the change in heading about which the General Counsel is dismissive actually "nullifies" the effect of the alleged agreement on the California Differential. In other words, the change in heading was a material change in the proposal made by UHW. Mr. Ruppert then makes a further proposal in his e-mail in an attempt to resolve the parties' differences. (RX-59(a).) That counter-proposal necessarily precludes any agreement from having been reached.

The General Counsel further attempts to mischaracterize the record claiming that a note by Mr. Pullman in an earlier version of the term sheet reflected the parties' agreement to delay the complete resolution of the California Differential issue until after execution. In that note, Mr. Pullman simply states that "we can verify tomorrow or send us the T/A," which the General Counsel argues meant that the parties had agreed to verify "application of overtime wages without the California differential at a later date." General Counsel's Brief at 5, 10-11.

Once again, the context of that note makes it abundantly clear that the note did not mean what the General Counsel argues. The note was a response to Ms. Schottmiller's mistaken assertion that she already had agreed with Mr. Ruppert on "how this [the California Differential] would work." (JX-2, at 7). Pullman was expressing his intent to verify if an agreement did exist as represented by Schottmiller, nothing more. (Tr. 270:7-9, RX-59(a).). Read properly, Mr. Pullman's statement is an affirmation of his complete lack of knowledge of the existence of any agreement on this material term.

B. The Additional Remedies Sought by UHW are Baseless

UHW excepts to the remedies imposed by ALJ Thompson, asserting that the ALJ should have imposed a number of additional remedies, including litigation costs, bargaining costs, and a host of other unprecedented and unwarranted measures. As UHW has admitted that no agreement exists, and that the General Counsel and the Charging Party to this day cannot even agree on what agreement exists, the Hospitals are not liable for the unfair labor practices here. Certainly, these issues create substantial and serious issues that the Hospitals were justified in raising.[2]

UHW requests that an award of its bargaining costs be levied against the Hospitals. Such a request for bargaining cost was withdrawn by the General Counsel and rejected by ALJ Thompson. The Board has held that such an award of costs is only justified "where it can be said that a respondents unfair labor practices have infected the core of the core of a bargaining

[2] The Hospitals specifically address only UHW's request for bargaining costs and litigation costs, as they are the only of these remedies that UHW even attempts to justify under Board law. The remainder of the remedies proposed by UHW are readily dismissed. UHW has provided no legal support nor adequate justification for the NLRB to depart from its traditional remedies. *See Postal Service*, 360 N.L.R.B. No. 35, slip op. at 5 (2014), *Chinese Daily News*, 346 N.L.R.B. 906, 909 (2006).

process to the extent that their effects cannot be eliminated by the application of traditional remedies." *Unbelievable, Inc.,* 318 N.L.R.B. 857, 859 (1995).

The Hospitals have demonstrated that the unfair labor practice tried in this matter -- the failure to execute a purported CBA between the Hospitals and the Charging Party – is without merit. Even if the Hospitals were found liable for a failure to execute the purported agreement, UHW has not demonstrated in any way why the remedy ordered by the ALJ –an order affirmatively requiring the Hospitals to execute the agreement – would not be adequate to repair any effects on the bargaining process.

UHW's request also is pointless. The union requests its bargaining costs from November 10, 2014 onward – a point in time after which there was no additional bargaining for an agreement at the Hospitals. And as the union is claiming in its charge that an agreement has been reached, no further bargaining would be required should UHW succeed in its frivolous claim. Consequently, there can be no additional costs to recover.

UHW also makes a baseless argument for the imposition of an award of litigation costs on the Hospitals. This remedy is foreclosed because the Board lacks the statutory authority to impose such costs. In *Ayeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975); the Supreme Court held that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." There must be "clear support" for an award of litigation expenses "either on the face or in the legislative history of the statute; congressional silence is treated as an indication that the legislature did not intend to authorize fee shifting." *Unbelievable, Inc.*, 118 F.3d 795, 801-803 (D.C. Cir. 1997). In *Unbelievable*, the D.C. Circuit held that there is no such "clear support" for an award of litigation expenses under the text or the legislative history of the

NLRA and thus the Board lacks authority to order such an award." *Id*. at 806; see also *Quick v. NLRB*, 245 F.3d 231, 256-57 (D.C. Cir. 2001).

Even if such a remedy were authorized, such an award is plainly not warranted under the circumstances of this case. An award of litigation expenses is an extraordinary remedy appropriate only where a party raises "patently frivolous defenses." *Super Save*, 273 N.R.R.B. 20, 20 n.1 (1984), *Park Inn Home for Adults*, 293 N.L.R.B. 1082, 1082 n.3 (1989). Defenses which are merely "unpersuasive" or "debatable" are not frivolous. *Id*. Far from frivolous, the Hospitals' defenses in this matter were meritorious and should result in dismissal of the complaint. Indeed, the ALJ made findings which should have compelled a decision in favor of the Hospitals. Accordingly, there is plainly no justification for an award of litigation expenses in this matter.

CONCLUSION

For the foregoing reasons as well as for the reasons articulated in the Brief in Support of Respondents' Exceptions to Administrative Law Judge Lisa D. Thompson's Decision, the ALJ abused her discretion in finding that the Hospitals violated the Act as alleged in the Complaint. Accordingly, the ALJ's Decision should be reversed and the Complaint should be dismissed. Further, the Cross-Exceptions of the General Counsel and UHW should be denied.

Dated: April 28, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of April, 2016, copies of the foregoing Consolidated Reply Brief in Support of Respondents' Exceptions and Answering Brief to the Office of the General Counsel's and the Charging Party's Cross-Exceptions was filed electronically and copies were sent via e-mail and first-class mail to the following:

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